UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

STATE OF CONNECTICUT *ex rel.* RICHARD BLUMENTHAL, ATTORNEY GENERAL; and

TOWNS OF NORTH STONINGTON, LEDYARD, and PRESTON, CONNECTICUT,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR,
1849 C Street, NW
Washington, DC 20240;
BUREAU OF INDIAN AFFAIRS,
1849 C Street, NW – MS-4542-MIB
Washington, DC 20240-0001;
BRUCE BABBITT, Secretary of the Interior (in his official capacity),
1849 C Street, NW - MS-6151-MIB
Washington, DC 20240;
KEVIN GOVER, Assistant Secretary for Indian Affairs (in his official capacity),
1849 C Street, NW - MS-4140-MIB
Washington, DC 20240; and
M. SHARON BLACKWELL, Deputy Commissioner for Indian Affairs (in her official capacity),
1849 C Street, NW – MS-4140-MIB
Washington, DC 20240,

Defendants.

CIVIL ACTION NO.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs the State of Connecticut, ex rel. Richard Blumenthal, Attorney General, and the Towns of North Stonington, Ledyard, and Preston, Connecticut file this Complaint for Declaratory and Injunctive Relief, and for their causes of action state:

INTRODUCTION

1. The tribal acknowledgment procedures of the Bureau of Indian Affairs (BIA) were designed to elicit information and evidence from all interested parties on a schedule that provides notice and opportunity to those parties and enables meaningful participation in the proceeding and the development of a complete and objective record on which to make the acknowledgment determination. In this case, defendants have behaved in an arbitrary and capricious manner that has prevented meaningful participation by the Towns and the State of Connecticut and prevented the expected reasoned process by: (a) ignoring the mandatory acknowledgment criteria in existing BIA regulations; (b) arbitrarily changing deadlines so as to preclude consideration of evidence provided by the Towns and the State; (c) withholding information and documents required by law and regulations to be provided to them; and (d) imposing new regulations, which substantially changed the acknowledgment process, without submitting them to notice and comment rulemaking. These actions individually and in combination constitute arbitrary and capricious decisionmaking that is not in accordance with the law and thereby violates the Administrative Procedure Act (APA).

2. In 1978, BIA of the Department of the Interior (DOI) promulgated regulations under which BIA determines whether to formally "acknowledge" the existence of Indian tribes under federal law. 43 Fed. Reg. 39361 (Sept. 5, 1978).

3. The act of acknowledgment carries great significance, as it establishes a government-to-government relationship between the United States and an Indian group. It

positions the acknowledged tribe to pursue land claims against innocent property owners, seek a reservation and trust lands exempt from State and local jurisdiction, assert sovereign immunity from suit, and receive significant benefits from the federal government. Since 1988 and the enactment of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2701 et seq., acknowledgment also positions tribes to secure extraordinary wealth by means not available to non-Indian entities through the development of Indian gaming. In fact, the relatively recently-acknowledged Mashantucket Pequot and Mohegan Tribes operate casinos in southeastern Connecticut that generate estimated gambling revenue of well over $1 billion annually.

4. The BIA acknowledgment process is designed to test the continuous existence of a tribal group since the time of first sustained contact with non-Indians. Failure of an Indian group to prove this tribal continuity and meet other tests under seven mandatory criteria defeats the acknowledgment claim. 25 C.F.R. § 83.10. Thus, the thoroughness and integrity of the acknowledgment fact-finding process is vital to the resolution of claims to tribal status.

5. Although there was but a single Pequot Nation at the time of first contact, there are now two acknowledged tribes derived from the original Pequots (Mashantucket Pequot in Ledyard/Preston and the Mohegan in Montville), and at least seven other groups laying claim to the same Pequot tribal mantle (Eastern Pequot in North Stonington, Paucatuck Eastern Pequot in North Stonington, Mohegan Tribe & Nation in Norwich, possibly the Nehantic in Chester depending on the nature of their claims, Southern Pequot in Waterford, Pequot Mohegan in Middletown, and Poquonnock Pequot in Ledyard). The lure of gaming wealth has attracted to the two Pequot tribal groups furthest along in the acknowledgment process – the Eastern Pequot (EP) and Paucatuck Eastern Pequot (PEP) groups – financial backers, ranging from Donald Trump to oil companies to ski resort developers. Other well-heeled backers are financially supporting the Golden Hill

Paugussett (Colchester, Trumbull) and Schaghticoke (Kent) petitioners in Connecticut. By investing millions of dollars in the acknowledgment process for petitioning groups, these financial backers seek to cash in on the gaming bonanza that is possible due to the unique monopoly Indian tribes in Connecticut hold over casino gambling in the populous Northeast Corridor.

6. Plaintiff Towns in this case are the three small Connecticut towns most affected by this juxtaposition of tribal acknowledgment and Indian gaming – Ledyard, North Stonington, and Preston. Already host communities to the world's largest casino, the Mashantucket Pequot Foxwoods resort, and only a few miles from the successful and rapidly expanding Mohegan Sun casino resort, these towns are also the proximate location of a reservation under State law and shared by a few members of the EP and PEP petitioners. These two groups both claim to be the legitimate descendants of the original Pequot Tribe. Hence, each group, supported by its own financial backers, is competing for acknowledgment to the exclusion of the other.

7. Plaintiff State of Connecticut is the State in which these petitioners are located and also has significant interests at stake as discussed below.

8. In addition to these two tribal petitioners, the Towns are in close proximity to three additional groups seeking acknowledgment located in Ledyard, Norwich, and Waterford. Any of the Connecticut petitioning groups could assert land claims and, thus cloud land titles, throughout the State, and some have done so.

9. Should either or both of the EP and PEP groups be acknowledged, the Towns and the State will see their land base and jurisdiction further diminished, together with their ability to protect the public interest, safety, and welfare through laws and regulations in the areas affected. The Towns and the State likely will face additional land claims brought against innocent property owners. The Towns and the State also are likely to be forced to confront adverse consequences of additional casino development. Facing

these threats, the Towns began to participate in the EP/PEP acknowledgment process in March, 1998 and the State began its participation in that process in early April, 1998. Since then, the Towns and the State have been subject to a series of abuses of process and violations of law by BIA that have diminished their legal rights and irrevocably tainted the acknowledgment process. Having exhausted every available means to remedy these deficiencies administratively, the Towns and the State now seek judicial intervention.

PARTIES

10. Plaintiff Towns are municipalities incorporated pursuant to the Constitution and laws of the State of Connecticut. All three Towns and the State are "interested parties" in the acknowledgment procedures for the EP and PEP tribal petitioner groups, as are the Governor and the Attorney General of the State. In that capacity, the Towns have commented and submitted information to BIA regarding the petitions, and the Towns and the State participated in the proceedings through requests for documents, participation in a formal technical assistance meeting as discussed below, and otherwise. As described more fully herein, BIA has frustrated the Towns' and the State's ability to participate in these procedures. The Towns and the State also are adversely affected with respect to these petitions, and for petitions of other nearby Connecticut tribal groups, by the February 11, 2000, unpromulgated rule published by the Assistant Secretary of the Interior for Indian Affairs, Kevin Gover, that altered the acknowledgment process. The Towns and the State were injured by this unpromulgated rule through the revocation of their right to submit evidence after petitions go on active consideration and before issuance of a proposed finding. They also were injured by the unpromulgated rule's limitation of the role of BIA researchers in conducting independent analysis of acknowledgment petitions. These changes to BIA's acknowledgment regulations were never published for public review. Nevertheless, after publication of the unpromulgated rule the Towns sought to

redress its deficiencies through administrative avenues, and the State also objected. BIA rejected the Towns' proposals and did not act on the State's objections.

11. Defendant DOI is the agency authorized to administer Indian affairs. DOI is the parent agency of the Bureau of Indian Affairs, which administers the tribal acknowledgement process under 25 C.F.R. Part 83.

12. Much of DOI's administrative burden relating to Indians is carried by defendant BIA. Through BIA, DOI makes decisions on requests by Indian groups to be acknowledged as tribes under federal law. BIA is processing the EP/PEP petitions.

13. Defendant Bruce Babbitt is sued in his official capacity as the Secretary of DOI, the duly appointed, qualified and acting administrative head of the agency, for his own actions or omissions or those of individuals working under his control or supervision.

14. Defendant Kevin Gover is sued in his official capacity as the Assistant Secretary for Indian Affairs for his own actions or omissions or those of individuals working under his control or supervision. The Secretary of the Interior has delegated authority for making acknowledgment decisions to the Assistant Secretary. Mr. Gover signed the proposed findings to acknowledge the EP and PEP groups and issued the February 11, 2000, unpromulgated rule modifying the acknowledgment procedures in 25 C.F.R. Part 83. Prior to serving as Assistant Secretary, Mr. Gover was an attorney in private practice representing the Golden Hill Paugussett group of Connecticut in its pursuit of tribal acknowledgment.

15. Defendant M. Sharon Blackwell is sued in her official capacity as the Deputy Commissioner for Indian Affairs for her own actions or omissions or those of individuals working under her control or supervision. In that capacity, she is responsible for overseeing the administration of the tribal acknowledgement process.

16. Although not a party defendant in this action, the Branch of Acknowledgment and Research (BAR) in BIA plays a prominent role in the

acknowledgment process. BAR is responsible for making recommendations on tribal acknowledgment petitions to the Assistant Secretary. BAR is processing the EP and PEP petitions.

JURISDICTION AND VENUE

17. Jurisdiction over this action is conferred upon the Court pursuant to 28 U.S.C. § 1331 and the Freedom of Information Act, 5 U.S.C. § 552 (FOIA). The action arises under the laws of the United States, in particular, the regulations promulgated by BIA in 25 C.F.R. Part 83. The statutory authority claimed for these regulations is 5 U.S.C. § 301, 25 U.S.C. §§ 2, 9, and 43 U.S.C. § 1457.

18. Declaratory relief may be granted under 28 U.S.C. § 2201, the APA, 5 U.S.C. §§ 701-706, FOIA, 5 U.S.C. § 552, the All Writs Act, 5 U.S.C. § 1651(a), and other provisions of applicable law.

19. All matters, omissions, or actions of defendants complained of herein constitute final agency action, and/or issues of law for which the agency's position is final and definite, and/or agency action improperly and unlawfully withheld or unreasonably delayed.

20. Venue lies in this district pursuant to 28 U.S.C. § 1391(e).

FACTS

The Acknowledgment Process

21. Prior to 1978, no established procedure existed for the Executive Branch to acknowledge the existence of an Indian tribe under federal law. In that year, BIA published regulations to provide a systematic procedure and uniform standards under which Indian groups could attain federal acknowledgment. 43 Fed. Reg. 23743 (Sept. 5, 1978). BIA promulgated these regulations in 25 C.F.R. Part 54. BIA took this action in response to the recommendation of the United States Congress' American Indian Policy Review Commission, which called for the use of "definitional factors" to determine tribal

status, see 1 American Indian Policy Review Comm'n, Final Report 480-83 (1977), and court cases that treated tribal status as a threshold issue. See U.S. v. Washington, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976); Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975).

22. To administer this program, BIA created the Federal Acknowledgment Project within the Division of Tribal Government Services. By 1981, the project had become the Branch of Federal Acknowledgment and, as a result of agency reorganization in 1984, became the BAR. Presently, BAR administers the acknowledgment regulations.

23. The 1978 acknowledgment regulations called for BIA experts in the fields of anthropology, genealogy, and history to review petitions submitted by Indian groups. This review would ascertain the facts of each group's claim to tribal existence and apply them against seven mandatory criteria. These regulations (originally promulgated as 25 C.F.R. Part 54) were redesignated in 1982 as 25 C.F.R. Part 83, 47 Fed. Reg. 13327, and revised in 1994 after extensive public review. 59 Fed. Reg. 9280.

24. The current acknowledgment process administered by BAR is conducted under the 1994 regulations. It begins with the filing of either a letter of intent or a documented petition by the Indian group. 25 C.F.R. §§ 83.4, 83.6. Within 60 days, BIA must publish notice of receipt of the letter of intent or petition. Id. § 83.9. This notice must announce the opportunity for "interested parties" to submit factual evidence and legal arguments. Id. Interested parties automatically include the governor and attorney general of the affected state and may include local governments and other entities. Id. § 83.1. These parties are entitled to "participate fully in the acknowledgment process" due to their "legal or property interest in a decision." 59 Fed.Reg. 9283. Other parties "often are able to contribute valuable information not otherwise available." Id. The provisions granting automatic interested party status to the governor and attorney general and authorizing that status also for local governments reflect the fact that, as BIA specifically recognizes,

tribal acknowledgment decisions result in perpetual government-to-government relationships between the petitioner and the United States and have "fundamental legal, social and economic impacts" not only on petitioners, but also on the neighboring community and federal, state and local governments.

25. Once a documented petition is received, BIA is required to begin a detailed review procedure. The first step is a preliminary analysis to determine if the petition is complete. As part of this review, BIA provides the petitioner with any needed technical assistance to help in supplementing the petition. Id. § 83.10(b)(1). Typically, petitioners make significant changes to their petitions during this period.

26. Once the petition is deemed complete, it is considered ready for "active consideration." At this point, the petition goes on a waiting list. The order for review is determined chronologically by the date of notification that the petition is ready for active consideration. Petitions can remain on the waiting list for many years. During this period, the petitions are frequently revised and supplemented with additional evidence from the tribal claimant. When the petition comes under active consideration, the petitioner and interested parties are notified. Id. § 83.10(f). The regulations expressly provide for the receipt of evidence after active consideration begins: "[t]he petitioner shall be notified of any substantive comment on its petition received prior to the beginning of active consideration or during the preparation of the proposed finding and shall be provided an opportunity to respond to such comments." Id. § 83.10(f)(2) (emphasis added).

27. To be acknowledged, a petitioner must satisfy seven criteria. Id. § 83.7(a)-(g). The burden is on the petitioner to prove the reasonable likelihood of the validity of the facts relating to each criterion. Id. § 83.6(d). These mandatory criteria are:

a. The petitioner has been identified as an American Indian entity on a substantially continuous basis since 1900;

b. A predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present;

c. The petitioner has maintained political influence or authority over its members as an autonomous entity from historical times until the present;

d. The petitioner has a governing document including membership criteria;

e. The petitioner's membership consists of individuals who descend from a historical Indian tribe or from historical Indian tribes which combined and functioned as a single autonomous political entity;

f. The petitioner's membership is composed principally of persons who are not members of any acknowledged tribe; and

g. The petitioner has not been terminated by Congress.

28. BIA must review the petition and evidence submitted by other parties and publish "proposed findings" with respect to these criteria in the Federal Register within one year of when active consideration begins, unless extended by up to 180 days. Id. § 83.10(h). In addition to the proposed findings, BIA is to provide the petitioner, interested parties, and informed parties "a report summarizing the evidence, reasoning, and analyses that are the basis for the proposed decision." Id. The issuance of the proposed finding is a seminal event in the acknowledgment review, serving as a discrete BIA action that will focus the comments of the petitioner and interested parties. 59 Fed. Reg. 9290. As BIA explains in its 1997 Official Guidelines to the Federal Acknowledgment Regulations (BIA Guidelines), the proposed finding is:

> a preliminary decision issued by the Assistant Secretary – Indian Affairs, and contains the formal notification as to whether or not, on

> the basis of the documented petition, the petitioner has been determined to meet the criteria.

BIA Guidelines, at 67 (emphasis added). As BIA further explains in its Guidelines, "a proposed finding is a complete decision," and may be reversed only if "new information is discovered." Id. (emphasis added). New information responding to the proposed finding, "may be located by the petitioners, interested parties, experts who are interested in the case, and the BIA staff." Id.

29. The importance of the proposed finding is further confirmed by BIA's mandatory "technical assistance" procedures. Upon publication of the proposed finding, any party has 180 days, subject to extension for another 180 days, to "submit arguments and evidence to the Assistant Secretary to rebut or support the proposed finding." 25 C.F.R. § 83.10(i). During this period, "the Assistant Secretary shall provide technical advice concerning the factual basis for the proposed finding, the reasoning used in preparing it, and suggestions regarding the preparation of materials in response to the proposed finding." This is referred to as "informal technical assistance." Id. § 83.10(j)(1) (emphasis added).

30. In addition to informal technical assistance, "the Assistant Secretary shall, if requested by the petitioner or an interested party, hold a formal meeting for the purpose of inquiring into the reasoning, analyses, and factual bases for the proposed finding." Id. § 83.10(j)(2) (emphasis added). This formal technical assistance "shall be on the record." Id. Confirming the important, discrete nature of the proposed finding, BIA's guidance covering the formal technical assistance meeting states that the purpose is to "promote the exchange of information between the BAR researchers who were most involved in the decision and the petitioner and interested parties." BIA, Formal Technical Assistance Meetings at 1(October 1994) (emphasis added). BIA reiterates this point later in the same document, stating "the meeting is to permit inquiry into the bases of the decision." Id. at 4

(emphasis added). One technical assistance meeting is to be held per petition, and the discussion is to cover a previously prepared agenda. Id.

31. Once the comment period on the proposed finding has closed, the petitioner has 60 days, subject to extension, to respond to comments submitted by other parties. 25 C.F.R. § 83.10(k).

32. Within 60 days after consideration of the responses to the proposed finding begins, the Assistant Secretary is to issue a final determination. Id. § 83.10(l)(2). This period may be extended. Id. § 83.10(l)(3). The final determination becomes effective within 90 days of Federal Register publication, id. § 83.10(l)(4), although a variety of appellate procedures are available. Id. § 83.11.

The Role of BAR

33. The acknowledgment regulations are implemented by BAR. BAR currently consists of employees with expertise in anthropology, genealogy, and history. Applying research methods in these fields, BAR reviews and evaluates petitions for acknowledgment and makes recommendations to the Assistant Secretary for Indian Affairs. BAR also fulfills other functions under the 25 C.F.R. Part 83 regulations, including consulting with petitioners and interested parties, conducting technical assistance, and performing administrative functions.

34. BIA acknowledges that the "primary mission of the BAR is to evaluate the evidence presented by petitioners to determine if they meet the criteria to be acknowledged as a federal tribe." BIA Guidelines, at 12. As part of this function, "BAR staff conducts an independent analysis of the petition's narrative text and its supporting documents." Id. at 13 (emphasis added). As BIA explains this independent analytical function: "BAR's original research is primarily to answer questions arising from the evaluation of the petition." Id. (emphasis added). It is essential for BAR to "verify the claims" because "BIA cannot take the petitioner's statements at face value." Id.

35. Throughout the history of the acknowledgment process, BAR's recommendations have been given deference by the Assistant Secretary. Until the EP and PEP petitions, there had never been an instance where a BAR recommendation to grant or deny acknowledgment or issue a proposed finding for grant or denial was unilaterally overturned by an Assistant Secretary. A positive proposed finding has never been overturned at the final determination stage.

36. An improper positive proposed finding shifts the burden from the petitioner to the interested parties in showing that the proposed finding is incorrect.

February 11, 2000 Gover Unpromulgated Rule Amending 25 C.F.R. Part 83

37. Since they were first proposed in 1977, the BIA acknowledgment regulations have been developed through detailed public review procedures. In fact, their evolution has entailed four separate comment periods during which hundreds of comments were submitted.

38. As a general matter, DOI's internal policy guidance requires the solicitation of public input on issues of general concern, even if the agency actions involved do not constitute rules.

39. As stated in the DOI Departmental Manual, "[t]he Department of the Interior will offer the public meaningful opportunities for participation in decision-making processes leading to actions and policies which may significantly affect or interest them." 301 DM 2.1. Such public participation is to provide a "systematic opportunity for the public to know about and express their opinions on possible Departmental actions and policies." Id. at 2.2B. DOI's requirements include the duty to: "[n]otify the widest range of people of the possibility of a policy or action;" "[a]llow enough lead time . . . that individuals and groups have time to consider the values at stake for them and make arrangements to participate;" "[a]llow time and means for public comments;" and

"[p]rovide for feedback to the public involved as to action or 'no action' decisions after their participation." Id. at 2.6F.

40. Despite the history of public involvement in the evaluation of the acknowledgment process and Departmental policy in favor of such review, Assistant Secretary Gover unilaterally issued a final notice published in the Federal Register on February 11, 2000 announcing significant changes in the acknowledgment process. 65 Fed.Reg. 7052. The notice stated that the changes in procedure were effective that date, February 11, 2000, and were to apply to all future proposed findings, except for the Little Shell of Montana petitioner, and to all future final determinations, except for the Cowlitz petitioner, where technical reports had already been prepared. There was no opportunity for public comment and no advance notice that this unpromulgated rule was being prepared.

41. Among the changes to the acknowledgment process resulting from Mr. Gover's unpromulgated rule is a prohibition on the consideration of evidence by any party submitted after a petition goes under active consideration and until a proposed finding is issued. Id. at 7053. This change directly conflicts with the existing BIA regulation which provides that petitioners will be notified of, and allowed to respond to, "any substantive comment on its petition received prior to the beginning of active consideration or during the preparation of the proposed finding." 25 C.F.R. § 83.10(f)(2) (emphasis added). By prohibiting the review of evidence submitted between the active consideration date and the proposed finding, Mr. Gover's unpromulgated rule also conflicts with section 83.10(a) that the Assistant Secretary "may likewise consider any evidence which may be submitted by interested parties or informed parties." (Emphasis added).

42. This change has a substantial impact on interested parties. Although BIA must inform third parties of the receipt of a notice of intent to file a petition or an initial

petition, id. § 83.9(b), (c), there is no requirement to apprise other parties of the development of the petition or changes to it while it is undergoing revision and technical assistance prior to active consideration. As a result, petitioners can substantially revise their requests with no notice to interested parties and without providing interested parties with copies of their submissions. The EP and PEP groups followed this practice and failed to provide most of their documents submitted to the BIA to the Towns and the State. The next required notice to interested parties is when the documented petition comes under active consideration. Id. § 83.10(f). This creates a catch-22 because, under the Gover unpromulgated rule, BIA must ignore all evidence received after that date and until the proposed finding is issued. Thus, petitioners can (and do) work in concert with BAR to develop and supplement their petitions up to the date of active consideration. This process of supplementing the record and developing the strongest case for acknowledgment can take place without notice to interested parties and without public scrutiny or access. By the time interested parties are given notice that BAR is proceeding with active consideration, it is too late to submit any evidence. This deficiency is aggravated by BIA's failure to provide third parties with petitioner's documents in a timely manner. As a result, the critical proposed finding, which BIA itself considers "a complete decision" subject to reversal only upon discovery of "new information," can proceed with no meaningful opportunity for third parties to comment or submit evidence. In this manner, interested parties have been precluded from submitting any evidence on a petitioner's substantive application, contrary to BIA's regulations which are intended to ensure that "[i]nterested parties participate fully in the acknowledgment process." 59 Fed. Reg. 9283.

43. In recognition of the need to allow third parties to submit evidence, after active consideration begins, to be taken into account in preparing a proposed finding, BIA historically followed the practice of accepting such evidence submitted prior to a cut-off

date set on a case-by-case basis with advance notice. Although BIA never incorporated this practice into the acknowledgment regulations, it was standard agency practice. The Gover unpromulgated rule changed this practice by post hoc exclusion of all third-party evidence that had been submitted after active consideration.

44. The Gover unpromulgated rule also brought about another significant change in the acknowledgment process. Contrary to BIA practice and the Acknowledgment Guidelines, Gover prohibited BAR staff from conducting most forms of independent research. This mandate conflicts with the regulatory provision that "the Assistant Secretary may also initiate other research for any purpose relative to analyzing the documented petition and obtaining additional information about the petitioner's status." 25 C.F.R. § 83.10(a) (emphasis added). In effect, Assistant Secretary Gover debilitated the role of BAR staff and made it far more difficult for the agency to carry out its function, as defined by the Guidelines, of not taking petitions "on face value." BIA Guidelines, at 13.

45. BAR staff have acknowledged on the record in the EP/PEP partial formal technical assistance meeting held on August 8 and 9, 2000, that the Gover unpromulgated rule affected the manner in which the petitions were processed and worked to the disadvantage of the Towns. The unpromulgated rule also disadvantaged the State by precluding consideration of any materials it might wish to submit during active consideration.

Eastern Pequot and Paucatuck Eastern Pequot Petitions – Processing Before Active Consideration

46. BIA received a letter of intent from the EP on June 28, 1978. BIA published notice in the Federal Register on January 2, 1979. 44 Fed. Reg. 116. The EP was assigned #35 on the petitioner priority review list. The EP did not submit its documented petition until May 5, 1989. BIA, Summary Under the Criteria and Evidence

for Proposed Finding – Eastern Pequot Indians of Connecticut at 5 (Mar. 24, 2000) (EP Summary Report).

47. In less than one year from the date on which the EP submitted their petition, BIA issued an "obvious deficiencies" (OD) technical assistance letter to the EP. This letter detailed numerous, serious weaknesses with the EP claim to acknowledgment.

48. Over five years later, on May 2, 1995, the EP submitted a partial response to the OD letter. Id. EP submitted a supplemental response on October 4, 1995, at which point BIA declared the petition "ready" for active consideration. Id. BIA placed the petition on active consideration as of January 1, 1998. Id.

49. The Town of North Stonington requested interested party status in the EP petition review by letter of March 23, 1998, to ensure the development of a complete and objective record. The Town also requested all documents pertaining to the petition. Preston and Ledyard requested interested party status by letters of April 29 and May 5, 1998. BIA granted these requests by letters of July 14, 1998. The Governor and Attorney General are automatically interested parties under the regulations and have also requested petition documents and other records as discussed below.

50. BIA received a letter of intent and initial petition from PEP on June 20, 1989. BIA published notice in the Federal Register on July 20, 1989. 54 Fed.Reg. 30474. BIA assigned the petition #113 on the petition priority list. BIA did not receive the PEP documented petition until April 21, 1994. BIA, Summary Under the Criteria and Evidence for Proposed Finding – Paucatuck Eastern Pequot Indians of Connecticut at 5 (Mar. 24, 2000) (PEP Summary Report).

51. BIA issued an OD technical assistance letter to the PEP in less than five months. Id. Nearly one and one-half years later, PEP responded with supplemental evidence. Id. BIA placed the PEP petition on "ready, waiting for active consideration" status on May 10, 1996. Id.

52. By letter of March 23, 1998, the Town of North Stonington requested interested party status in the PEP petition to ensure the development of a complete and objective record. The Town also requested all documents pertaining to this petition. Preston and Ledyard requested interested party status by letters of April 29 and May 5, 1998. BIA granted these requests by letters of July 14, 1998.

53. On April 2, 1998, BIA took the unusual step of waiving the priority list for PEP (#113) and moving it forward for active consideration in conjunction with EP (#35), benefiting PEP's review schedule.

Document Requests and Freedom of Information Act Violations

54. North Stonington's March 28, 1998, request for documents began its effort to obtain documents from BIA. The State requested complete copies of the petition acknowledgment files for the petitioners on April 9, 1998, including all submissions and correspondence. The State also made subsequent requests for related documents. These included, but were not limited to, copies of documents provided the BIA during field visits to the petitioners in March, 1999, and transcripts of those visits, which would have included interviews. The BIA had denied the State's request to be present during those field visits, but did assert that transcripts of the interviews when made and the field notes would be available under the FOIA. BIA interview material, presumably from the field visits, was later cited a number of times in the proposed findings. By letters of September 17, 1998, February 12, 1999, and January 20, 2000, the Towns joined the State in pursuing these documents under FOIA, 5 U.S.C. §552, which requires release of documents within 20 days. The Towns and State took various actions to facilitate BIA's processing of the request.

55. Although various documents were released on August 7, 1998, the first two installments of the petition documents themselves were not released until March 16 and 22, 1999, less than a month before the cut-off date for comments on the petitions

discussed below, which neither the Towns nor the State had been informed of previously. No additional petition documents were received until after the proposed finding, which was too late to be of use for that purpose. Some BIA interview material was released September 5, 2000, which was too late to be of assistance for the purpose of the BIA formal technical assistance meeting held on August 8 and 9, 2000. The remaining portion of this material has not been released yet.

56. Notwithstanding the fact that many documents and some of the BIA interviews were eventually provided almost a year and more after they were requested, many other materials have not yet been released, including but not limited to: (1) thousands of remaining pages of the documented petitions; (2) a number of untranscribed tape cassettes of field interviews conducted by BIA staff with the petitioners during the field visits above; (3) copies of documents provided to BIA by the petitioners during those field visits; and (4) the complete researchers' files and notes for the petitions and records of any other field visits by the BIA to the petitioners.

57. These documents are still outstanding notwithstanding numerous inquiries by the Towns and State, requests by various members of the Connecticut Congressional delegation, and two FOIA appeals filed with DOI.

58. The Towns and the State have a vital need for the documents withheld in order to file a meaningful response to the proposed findings and also to participate effectively in any technical assistance meetings with BIA staff.

The Eastern Pequot and Paucatuck Eastern Pequot Petitions – Initiation of Active Consideration Through Proposed Finding

59. Upon achieving interested party status, the Towns established a team of technical experts to assist in the review of the petitions.

60. By letters of September 17, October 5, and November 23, 1998, the Towns requested that BIA extend the period for review prior to the proposed finding because of

BIA's failure to respond to the Town/State document request. The Towns also requested to participate in BIA's meetings with the tribal petitioners. BIA did not respond. Although the Towns served both petition groups with copies of every document submitted to BIA, neither group followed the same practice and frequently filed documents with BIA without making them available to the Towns.

61. On December 15 and 29, 1998, the Towns submitted their initial research report to BIA. This report was based on the Towns' original research. The Towns emphasized again the need to obtain the official petition files from BIA. On February 5, 1999, the Towns submitted their second evidentiary report based on their original research.

62. By letters of March 18, and 23, 1999, the Towns requested that the BIA anthropologist meet with Town officials during his research trip to Connecticut on the EP and PEP petitioners. BIA informed the Towns on March 25 that the anthropologist would not meet with them.

63. The State also requested, on March 17, 1999, that a representative of the State or the Towns be present for the field visits, and after this request was denied by telephone on March 22, 1999, renewed its request on March 23, 1999, to have a representative present. The BIA denied this request on March 25, 1999. The BIA stated instead that the transcripts and field notes would be available under the FOIA as stated previously.

64. On April 16, 1999, the Towns filed their third evidentiary report based on their original research.

65. On May 20, 1999, the Towns filed their fourth evidentiary report based on their original research.

66. On July 1, 1999, the Towns submitted their fifth evidentiary report based on their original research.

67. On July 12, 1999, the Towns submitted their sixth evidentiary report based on their original research.

68. Between October 1999, and January 2000, the Towns placed telephone calls to BIA to request access to the petition files. BIA either failed to return these calls or repeatedly postponed the date for the Towns to review the files. BIA finally provided access to the files on February 8, 2000. During that review, the Towns discovered numerous documents filed by petitioners that had not been served on the Towns. The Towns requested those documents in a FOIA letter dated February 16, 2000. To date, BIA has not released these documents or responded to the request.

69. In response to pressure from the petitioners on BIA, on January 28, 2000, BIA wrote to the petitioners stating that proposed findings would be issued on March 7, 2000. The Towns objected to this schedule by letter of February 7, 2000, again noting the unfairness of the process to interested parties.

70. On February 11, 2000, Mr. Gover issued his unpromulgated rule mandating changes to the acknowledgment process.

71. Immediately upon learning of the unpromulgated rule, the Towns inquired as to what effect it would have on the evidence they had submitted on the EP and PEP petitions. Initially, they were told by BAR staff that the unpromulgated rule would mean only evidence submitted before February 11, 2000, would be considered in the proposed finding. Soon thereafter, the Towns were told that BIA had set a cut-off date for evidence of April 5, 1999. BIA had notified EP and PEP of this deadline around the time the deadline was set. The Towns, however, had not been notified of that deadline, and as a result, the Towns' third through seventh evidentiary reports were not considered by BIA in preparing the proposed finding.

72. Although BIA considered the petitioners' attacks on experts working for the Towns, despite the fact that many of them were submitted after the deadline, BIA did not consider the Towns' responses to those attacks.

73. On March 3, 2000, the Towns wrote to BIA seeking clarification of the cut-off date and the effect of the Gover unpromulgated rule on the consideration of the EP and PEP petitions. On the same date, BIA faxed a letter to counsel for the Towns that stated "[a]s you may be aware, BIA had previously set a deadline of April 5, 1999, for the submission of evidence which would be considered for the proposed finding on these two petitioners." Neither the Towns nor the State had previously been advised of this deadline. On March 6, 2000, the Towns wrote to BIA to object to the April 5, 1999, cut-off date. The Towns repeated their request on March 2 that BIA answer certain questions about the cut-off date and how it was selected. The Towns repeated this request in letters of March 29, April 28 and May 30. BIA never responded to these letters.

74. On March 6, 2000, the Towns submitted their seventh evidentiary report based on their original research.

75. On March 7, 2000, Assistant Secretary Gover advised both petitioners that the deadline for issuance of a proposed finding would be extended to March 24, 2000. Gover explained that BAR had provided draft decisions to him. Gover also indicated that he had been briefed on BAR's recommended decision. He stated that, "[c]onsistent with long standing internal procedures" BIA has not reviewed materials submitted by petitioners and interested parties after the April 5, 1999 cut-off date. As it would later be revealed, BIA did in fact consider evidence from petitioners, but not from the Towns, received after this date.

76. BAR recommended to Assistant Secretary Gover that proposed findings be issued denying acknowledgment to both the EP and PEP petitioners as recognized Indian

tribes. Mr. Gover nevertheless rejected these recommendations and ordered positive findings in a memorandum issued on March 16, 2000.

77. On March 24, 2000, Mr. Gover issued proposed findings in favor of acknowledging both groups. He did so even though BIA could not make findings under mandatory criteria (b) and (c), which require proof of tribal political and social continuity to the present. Specifically, BIA stated it could not make a ruling under these criteria for the period 1973 to the present for either petitioner. In no previous BIA proposed finding had BIA issued a positive decision when complete findings could not be made under all criteria. In addition, Gover's decision gave significant, if not determinative weight, to the fact that State of Connecticut had recognized these groups in the past. In previous acknowledgment decisions, BIA consistently held that state recognition could not be counted on to indicate the existence of a tribe under federal criteria, because, among other reasons, state requirements for recognition varied widely and were not binding on the federal government.

Eastern Pequot and Paucatuck Eastern Pequot Petitions – Review of Proposed Findings

78. On April 26, 2000, the Towns wrote to BIA requesting informal technical assistance under 25 C.F.R. § 83.10(j)(1). The purpose of the request was to obtain guidance from BAR in reviewing and commenting on the proposed findings. BIA guidance of this nature is important in submitting an effective and meaningful response to the proposed finding.

79. On April 28, 2000, the Towns wrote to Assistant Secretary Gover asking him to participate in a public forum to discuss the acknowledgment process. Gover did not respond.

80. In reviewing the proposed findings, the Towns determined that BIA had in fact considered substantial evidence submitted by the petitioners after the April 5, 1999,

cut-off date in preparing those findings. These documents were among those discovered by the Towns during their February 8, 2000, review of BIA files and subject to the February 16, 2000, FOIA request. None of the Towns' evidence submitted after the cut-off date was considered.

81. On May 5, 2000, the Towns wrote to Assistant Secretary Gover asking him to recuse himself from the EP and PEP petitions. The basis for this request was Gover's decision in the proposed finding to give significant weight to the recognition the State had provided to these groups. This new principle, if applied to Gover's former client, the Golden Hill Paugussett petitioner, could be improperly used as precedent for acknowledgement of that group. Mr. Gover had previously recused himself from participating in the Golden Hill matter. On the advice of agency counsel, Mr. Gover also agreed to not participate in petitions that presented issues that could directly influence the outcome of the Golden Hill Paugussett petition.

82. Connecticut Attorney General Blumenthal, on July 14, 2000, also requested, for similar reasons, that Mr. Gover withdraw the proposed findings in the EP and PEP petitions, recuse himself completely from any consideration of them, and have them considered by a different, impartial decisionmaker.

83. In addition, Attorney General Blumenthal requested, on July 27, 2000, that the Solicitor for DOI, John Leshy, review and consider the Attorney General's July 14, 2000, recusal request because of the incurable taint of the Assistant Secretary's participation in the EP and PEP petitions and the need to prevent an obvious conflict of interest and improper command influence in those petitions. The Attorney General again requested that the proposed findings be withdrawn and that the petitions be considered by an independent decisionmaker not under the control of the Assistant Secretary Gover and who did not report to him.

84. On May 5, 2000, counsel for the Towns submitted a detailed letter to Secretary Babbitt addressing numerous deficiencies in the BIA acknowledgment process and asking for withdrawal of the proposed finding, recusal of Mr. Gover, revocation of the April 5 cut-off date, release of the requested documents, a new opportunity for comment by interested parties, withdrawal of the February 11 Gover unpromulgated rule, and other forms of remedial action. Through their letter, the Towns sought an administrative resolution to their concerns that would avoid litigation.

85. In furtherance of these efforts, the Towns also met with DOI Solicitor John Leshy to discuss the May 5 letter to Secretary Babbitt.

86. On June 7, 2000, Attorney General Blumenthal wrote to Secretary Babbitt and members of Congress requesting a moratorium on tribal acknowledgment decisions until the serious deficiencies in the process were addressed. As part of the basis for this request, he cited Assistant Secretary Gover's testimony on S. 611, a bill to reform the acknowledgement process, conceding the serious problems with the procedure. This request was not granted.

87. On June 28, 2000, the Connecticut Congressional delegation wrote to Secretary Babbitt expressing concerns about the fairness of the acknowledgment process. They expressed concern over the objectivity and fairness of the review of these petitions, the April 5, 1999 cut-off date, and the failure to release documents and adhere to BIA standards. Assistant Secretary Gover responded by letter of August 8, 2000. In this letter, Gover acknowledged that BIA follows the practice "with all petitioners" of establishing a cut-off date for evidence. He admitted that the Towns had not been notified of the April 5, 1999, cut-off date and that the failure to do so was a "mistake." Gover also conceded that "approximately 6,500 pages" of materials requested by the Towns/State under FOIA still had not been released. He stated that the remaining documents would be released by the technical assistance meeting "or shortly thereafter." In fact, the next

installment of documents was not released until September 5, 2000, and many documents still have not been provided. Gover stated that he was willing "to consider appropriate actions to remedy any prejudice that may have resulted to the interested parties by delays in the FOIA response and the initial cut-off for considering submissions by interested parties." Gover expressed the view that the formal technical assistance meeting could address "many of the pending questions and issues."

88. On July 7, 2000, DOI Deputy Solicitor Cohen wrote to the Towns saying there was no reason for Assistant Secretary Gover to be recused from the EP and PEP petitions.

89. BIA changed the date of the formal meeting to August 8 and 9, and by letter of July 25 issued an official agenda for the meeting.

90. On July 27, the Towns again wrote to the Secretary noting additional serious deficiencies with the petition review and requesting remedial action. In this letter, the Towns objected to Mr. Gover's improper decision to overrule the BAR recommendations to issue negative proposed findings and BIA's reliance in the proposed findings on evidence submitted after the April 5, 1999, cut-off by petitioners, even though none of the Towns' evidence submitted after that date was considered.

91. On or about August 8, 2000, the State objected to the last-minute inclusion of the Narragansett Tribe as an interested party and the effect this could have on making it difficult to cover the agenda for the formal technical assistance meeting. According to BIA regulations, the purpose of that meeting is to allow the petitioner and any interested party to inquire into the reasoning, analyses and factual bases of the proposed finding. 25 C.F.R. § 83.10(2). Such technical assistance is essential in order to respond effectively and meaningfully to a proposed finding. The State reserved the right to request a continuance of that meeting if the full agenda could not be covered.

92. On August 8 and 9, 2000, BIA convened the formal technical assistance meeting on both petitions. BIA advised the Towns that the request for informal technical assistance was being deferred until after the formal meeting. In conversations with representatives of the Towns, BAR staff noted how important informal technical assistance would be and encouraged the Towns to continue to pursue that opportunity. At this meeting, BIA made several important admissions, including: (1) the BAR staff believed neither petitioner qualified for acknowledgment under criteria (b) and (c); (2) Assistant Secretary Gover overruled BAR staff to issue positive proposed findings; (3) the Towns had not been informed about the April 5, 1999 cut-off date until March 2000; (4) BAR did consider evidence submitted by the petitioners after the cut-off date but did not consider evidence submitted by the Towns; and (5) BIA has a standard practice of setting a cut-off date during the active consideration period and providing advance notice of that date to all parties.

93. Although an agreed-upon agenda had been developed for the formal technical assistance meeting, many of the agenda items were not addressed.

94. By letter of August 15, 2000, the State requested a continuance of the formal meeting. The State indicated that the participation of the Narragansett and Mashantucket Pequot tribes at the formal meeting was partially responsible for the inability to complete the BIA agenda items. In addition, the State also explained that it was placed at a significant handicap in participating in that meeting because BIA interview data relied on in the proposed findings as well as thousands of remaining pages of petition documents had not been provided, despite repeated requests.

95. The State agreed in its August 15 letter to attend informal technical assistance meetings first to narrow the issues, but also represented that continued formal assistance meetings were essential to complete the agenda. A formal technical assistance

meeting is automatically recorded and open to the public. An informal technical assistance meeting is not necessarily recorded and is also not open to the public.

96. On September 8, 2000, BIA stated that the State should first call to schedule informal technical assistance meetings, which could be recorded, as soon as possible after receiving the remaining requested materials. BIA further assured the State that, if after the informal technical assistance, the State believed that a continuation of the formal technical assistance meeting was necessary, the BIA would respond to the State's request at that time. The BIA also stated that any continuation of the formal meeting must be scheduled in the first part of December, 2000.

97. Only some of the BIA interview data was released on September 5, 2000. The State requested informal technical assistance on October 27, 2000, which was not acted upon.

98. The failure of BIA to provide technical assistance and to release thousands of pages of the remaining petition documents, the rest of the BIA interview materials and other items requested have significantly impaired the ability of the State and the Towns to submit a meaningful and effective response to the proposed finding.

99. On August 15, the State also wrote to BIA objecting to the continued failure to release thousands of pages of petition documents and the BIA field visit materials sought and requesting an extension of the comment period on the proposed finding under 25 C.F.R. § 83.10(i).

100. On August 15, 2000, the Town of Colchester, Connecticut, wrote to Solicitor Leshy. Colchester is an interested party in the Golden Hill Paugussett petition. In its August 15 letter, the Town of Colchester noted the potential for the EP and PEP proposed findings to affect the Golden Hill Paugussett petition, expressed concern about Mr. Gover's failure to recuse himself, and asked that the EP and PEP proposed findings be

withdrawn. The Town noted that those findings were "tainted" by Mr. Gover's involvement due to his prior representation of the Golden Hill Paugussett group.

101. On September 5, 2000, the Towns wrote to BIA requesting: (1) an extension of the comment period on the proposed finding; (2) a continuance of the formal meeting; and (3) informal technical assistance.

102. On September 8, 2000, Assistant Secretary Gover extended the comment period by 180 days until March 26, 2001. BIA noted that the State had been diligent in its review and research, and that the delay in providing the requested field notes and interviews was not caused by the State.

103. On September 18, 2000, the Towns again wrote to Secretary Babbitt expressing concern over Mr. Gover's involvement in the EP and PEP petitions. In addition to the previous grounds for recusal, the Towns referred to two interviews by Mr. Gover in the media. Gover referred to the public concern in Connecticut over the proliferation of acknowledgment petitions as "Indian bashing." He asserted that the Towns should "get involved rather than gripe from the sidelines." He attacked Attorney General Blumenthal for participating in the acknowledgment process which, in Mr. Gover's view, was not "to get an appropriate outcome" but to address "some political need he has in his home state."

104. By letter of October 2, 2000, Solicitor Leshy responded to counsel for the Towns regarding their requests for various remedial actions, including withdrawal of the proposed finding. In effect, Mr. Leshy denied the Towns' requests as set forth in their letters of May 5 and July 27 and other correspondence. He noted that Assistant Secretary Gover urged the interested parties to pursue informal technical assistance. He said, "I hope you will take advantage of that informal technical assistance to seek explanations or clarifications of the technical points raised in your letter which were not resolved by the formal meeting." He also noted that the Gover recusal issue was "moot in light of the

Assistant Secretary's extension of the comment period until March of 2001." Without explaining the basis for this conclusion, the implication is that Mr. Gover will not be making the final decision on the petitions due to his expected departure at the end of the Clinton Administration.

105. By letter of October 10, 2000, Acting Associate Solicitor for Indian Affairs Tim Vollmann wrote to the Towns to address the concerns they had raised. The Associate Solicitor sought to assure the Towns that "your concerns have been noted and added to the record." They would be "considered carefully" before a final decision is issued. Mr. Vollmann stated "we appreciate the interest the Towns have shown in these petitions and the Towns' willingness to participate fully in the Department's administrative process." Mr. Vollmann also emphasized the importance of the informal technical assistance to assure that "all comments are considered and there is the fullest possible record available to the ultimate decision maker."

106. During the months of August and September, BAR staff encouraged the Towns to avail themselves of informal technical assistance. In response, counsel for the Towns placed at least three telephone calls to BAR in the month of October to schedule informal technical assistance. These requests were never responded to.

107. On October 19, 2000, counsel for the Towns wrote to BAR again requesting informal technical assistance "at the earliest possible date." On a number of occasions, including October 27, 2000, the State also requested technical assistance.

108. By letter of October 26, 2000, the Towns again wrote to Secretary Babbitt regarding irregularities in the EP and PEP process. In particular, the Towns noted recent statements by Mr. Gover that revealed he had prejudged the EP and PEP petitions. Mr. Gover was quoted as saying "to assume the sky is falling just because we're going to correct what I believe is a historic injustice is ridiculous. Those Indian tribes in Connecticut have always been there." With reference to the Towns' role in the

acknowledgment process, Mr. Gover is cited as saying: "To think that we're sitting up here trying to think of ways to screw Southeastern Connecticut is narcissistic." With respect to his role in the proposed findings, Gover is reported to have stated: "I am the ultimate authority . . . . I overrule my staff all the time."

109. By letter of November 13, 2000, counsel for the Towns repeated the request for informal technical assistance. The State again requested this assistance by an email message on December 27, 2000.

Denial of the Towns' and the State's Requests for Relief

110. BIA has not provided informal technical assistance, continuance of the formal technical assistance, or released the remaining requested documents. Although no specific ruling has been received, DOI also has refused to withdraw the proposed findings, to reopen the comment period with a prior announced cut-off date for evidence, or to withdraw the February 11 Gover unpromulgated rule. Mr. Gover has not been recused from the petitions.

COUNT I
Failure to Provide Technical Assistance

111. Plaintiffs incorporate paragraphs 1 through 110 as though fully set forth herein.

112. Pursuant to 25 C.F.R. § 83.10(j)(1), defendants "shall provide technical advice concerning the factual basis for the proposed finding, the reasoning used in preparing it, and suggestions regarding the preparation of materials in response to the proposed finding." (Emphasis added)

113. Defendants have conceded plaintiffs are entitled to such technical assistance.

114. Despite numerous written and verbal requests for technical assistance, defendants have failed to provide such assistance to plaintiffs, as well as many of the

documents necessary to prepare for such a meeting. With the comment period on the proposed findings set to close in about two months, plaintiffs do not now have adequate time to participate in such assistance and act upon it in developing final comments.

115. Pursuant to 25 C.F.R. § 83.10(j)(2) defendants "shall, if requested by the petitioner or any interested party, hold a formal meeting for the purpose of inquiring into the reasoning, analyses, and factual bases for the proposed finding." (Emphasis added).

116. The State and the Towns requested such a meeting.

117. The meeting held on August 8 and 9, 2000, for this purpose failed to cover the agreed upon agenda as stated previously and did not discharge defendants' duty to hold a meeting to allow for inquiring into the proposed findings. Unless the comment period on the proposed findings is extended, there is insufficient time remaining before the close of the present comment period on March 26, 2001, to: (a) review documents requested, but yet to be provided, in order to utilize technical assistance meetings effectively; (b) schedule and transcribe informal technical assistance meetings and to conduct a formal technical assistance meeting if necessary and to have that meeting transcribed; (c) to utilize information and advice obtained as a result of those meetings; (d) conduct the necessary follow up research indicated as a result of those meetings; and (e) prepare comments and submit arguments and evidence.

118. Plaintiffs will suffer irreparable injury by defendants' failure to provide adequate and proper formal and informal technical assistance as required by 25 C.F.R. §§ 83.10(j)(1) and (2) in that failure to provide this assistance and advice and to extend the comment period for this purpose so impairs the plaintiffs' ability to participate meaningfully in the acknowledgment process as to render the process fundamentally unfair.

119. Defendants must be ordered to withdraw the proposed findings and be enjoined from further processing of the EP and PEP petitions until the relief requested in

this Complaint has been granted, new proposed findings published, and adequate and proper formal and informal technical assistance is provided to plaintiffs. If such relief is not granted, plaintiffs will suffer irreparable injury for which there is no adequate remedy at law.

COUNT II
Freedom of Information Act Violation

120. Plaintiffs incorporate paragraphs 1 through 110 as though fully set forth herein.

121. The records sought by the Towns and the State of Connecticut from BIA were and are identifiable records within the meaning of FOIA.

122. The refusal to disclose these records was wrongful and without lawful reason or excuse under 5 U.S.C. § 552(a)(3) and 43 C.F.R. §§ 2.13 and 2.17, and therefore, plaintiffs are entitled to the relief provided by the Act.

123. Unless the comment period is extended, there is insufficient time remaining before the present close of the comment period on March 26, 2001, to review, examine, and adequately analyze all the outstanding documents and materials even if released immediately, to transcribe the remaining BIA field interviews and to study them, and to utilize these materials for any subsequent technical assistance meetings provided by BIA. The Towns and the State have already been significantly harmed by not having these materials in time for effective use for the proposed findings and the formal technical assistance meeting of August 8 and 9, 2000.

124. Plaintiffs will suffer irreparable injury by defendants' not providing all remaining outstanding documents and materials requested and to extend the comment period for this purpose so that plaintiffs can utilize these documents and materials effectively in that the failure to release them and to extend the comment period so impairs

the plaintiffs' ability to participate meaningfully in the acknowledgment process as to render the process fundamentally unfair.

125. Defendants must be enjoined from withholding the records at issue and plaintiffs are entitled to injunctive relief directing defendants to make such records available to plaintiffs and/or their attorneys and to permit the inspection and copying of such records immediately and without further delay.

126. Further, defendants must be ordered to withdraw the proposed findings and be enjoined from further processing of the EP and PEP petitions until the relief requested in this Complaint has been granted, new proposed findings published, and adequate and proper formal and informal technical assistance is provided to plaintiffs. If such relief is not granted, plaintiffs will suffer irreparable injury for which there is no adequate remedy at law.

COUNT III
APA Violation – April 5, 1999, Cut-off Date

127. Plaintiffs incorporate paragraphs 1 through 110 as though fully set forth herein.

128. Defendants set a cut-off date of April 5, 1999, for evidence to be considered for the proposed finding. This date had binding effect on plaintiffs because all of their evidence submitted after that date was ignored. Plaintiffs submitted five reports after the cut-off date that were discounted. Despite the cut-off date, defendants considered reports submitted by petitioners after April 5, 1999. Defendants failed to provide notice to plaintiffs of this cut-off date at the time it was set, even though such notice was given to petitioners.

129. Defendants acted arbitrarily and capriciously and failed to accord fundamental fairness to plaintiffs with respect to the cut-off date.

130. Plaintiffs will suffer irreparable injury by the application of the arbitrary cut-off date of April 5, 1999, in that it so impairs the plaintiffs' ability to participate meaningfully in the acknowledgment process so as to render that process fundamentally unfair.

131. Defendants must be ordered to withdraw the proposed findings and be enjoined from further processing of the EP and PEP petitions until the relief requested in this Complaint has been granted, new proposed findings published, and adequate and proper formal and informal technical assistance is provided to plaintiffs. If such relief is not granted, plaintiffs will suffer irreparable injury for which there is no adequate remedy at law.

COUNT IV

APA Violation – Practice of Establishing Cut-off Dates Generally

132. Plaintiffs incorporate paragraphs 1 through 110 as though fully set forth herein.

133. BIA follows the uniform practice of setting a cut-off date for evidence after the initiation of active consideration but before issuance of a proposed finding. This practice affects parties participating in the acknowledgment process by defining their procedural rights. Such a cut-off date was set for the EP and PEP petitions without prior notice to interested parties. By operation of this cut-off date, plaintiffs were denied an opportunity to have relevant evidence considered in connection with the proposed findings.

134. BIA's uniform practice of setting a cut-off date qualifies as rule under the APA. 5 U.S.C. § 551(4). It has been applied by defendants with regulatory effect and without promulgation pursuant to the notice and comment requirements of the APA. By applying this deadline on the EP and PEP review, defendants caused harm to defendants.

135. Plaintiffs will suffer irreparable injury by the failure to promulgate the cut-off date requirement as a rule in that it so impairs the plaintiffs' ability to participate meaningfully in the acknowledgment process as to render the process fundamentally unfair.

136. Defendants must be ordered to withdraw the proposed findings and be enjoined from further processing of the EP and PEP petitions until the relief requested in this Complaint has been granted, new proposed findings published, and adequate and proper formal and informal technical assistance is provided to plaintiffs. If such relief is not granted, plaintiffs will suffer irreparable injury for which there is no adequate remedy at law.

COUNT V
APA Violations – Proposed Findings

137. Plaintiffs incorporate paragraphs 1 through 110 as though fully set forth herein.

138. Pursuant to 25 C.F.R. § 83.10(h), the Assistant Secretary "shall publish proposed findings" in the Federal Register as to whether a petition satisfies the mandatory criteria for acknowledgment in section 83.7.

139. Pursuant to 25 C.F.R. § 83.10(i), defendants are to make proposed findings available so that an "individuals or organizations wishing to challenge or support the proposed findings shall have 180 days to submit arguments and evidence to the Assistant Secretary to rebut or support the proposed finding."

140. Mandatory criterion (b) requires a finding that a "predominant portion of the petitioning group comprises a distinct community and has existed from historical times until the present." 25 C.F.R. § 83.7(b) (emphasis added).

141. Mandatory criterion (c) requires a finding that the "petitioner has maintained political influence or authority over its members as an autonomous entity from historical times until the present." Id. § 83.7(c) (emphasis added).

142. In its March 31, 2000, Federal Register notice under section 83.10(h), BIA states that it "makes no specific finding for the period 1973 to the present" under both criteria (b) and (c) due to insufficiency of evidence. 65 Fed. Reg. 17302, 17303. BIA further asserts that it will not issue a finding under criteria (b) and (c) until the final determination. Id.

143. BIA's proposed findings therefore violate the requirement for findings on community and political authority from historical times to the present as stated in BIA regulations, in violation of 25 C.F.R. § 83.10(h) which requires that the Assistant Secretary publish a proposed finding and prepare a report summarizing the evidence, reasoning, and analyses that are the basis for the proposed decision. By failing to do so, defendants have deprived plaintiffs of their opportunity under the regulations to review and comment upon the agency's findings, including the reasoning, analyses and evidence on which those findings are based.

144. Defendants' failure to publish findings for the period 1973 to the present has deprived and continues to deprive plaintiffs of their opportunity to "rebut or support" the proposed finding on criteria 83.7(b) and 83.7(c) as provided by 25 C.F.R. § 83.10(i). Defendants' failure to publish proposed findings for this period thus results in a lack of jurisdiction to issue a final determination because the necessary prerequisite for that final determination, a valid proposed finding, does not exist.

145. Plaintiffs will suffer irreparable injury by the defendants' failure to publish proposed findings in compliance with 25 C.F.R. § 83.10(h) in that failure to publish them so impairs the plaintiffs' ability to participate meaningfully in the acknowledgment process as to render the process fundamentally unfair.

146. Defendants must be ordered to withdraw the proposed findings and be enjoined from further processing of the EP and PEP petitions until the relief requested in this Complaint has been granted, new proposed findings published, and adequate and proper formal and informal technical assistance is provided to plaintiffs. If such relief is not granted, plaintiffs will suffer irreparable injury for which there is no adequate remedy at law.

COUNT VI
Arbitrary and Capricious Involvement of Assistant Secretary Gover

147. Plaintiffs incorporate paragraphs 1 through 110 as though fully set forth herein.

148. Assistant Secretary Gover has a clear and palpable conflict of interest in the outcome of EP and PEP petitions. His proposed finding, issued contrary to the findings of BIA staff, could be improperly used as a pretext or precedent for acknowledgment of the Golden Hill Paugussetts, his former client, despite the fact that this would not be justified. In addition, Gover has repeatedly demonstrated a predisposition in favor of the petitioners and bias against plaintiffs.

149. Defendants have acted arbitrarily and capriciously by allowing Assistant Secretary Gover to be involved in the acknowledgment review of these petitions. His participation has tainted the entire process and caused harm to plaintiffs.

150. Plaintiffs will suffer irreparable injury by the arbitrary and capricious involvement of Assistant Secretary Gover in the acknowledgment review of these petitions in that his involvement so impairs the plaintiffs' ability to participate meaningfully in the acknowledgment process as to render that process fundamentally unfair.

151. Defendants must be ordered to withdraw the proposed findings and be enjoined from further processing of the EP and PEP petitions until the relief requested in this Complaint has been granted, new proposed findings published, and adequate and

proper formal and informal technical assistance is provided to plaintiffs. If such relief is not granted, plaintiffs will suffer irreparable injury for which there is no adequate remedy at law.

COUNT VII
APA Violation – February 11 Gover Unpromulgated Rule

152. Plaintiffs incorporate paragraphs 1 through 110 as though fully set forth herein.

153. On February 11, 2000, defendants published a notice in the Federal Register announcing new procedures that alter the BIA acknowledgment process. This directive constitutes rulemaking because it modifies and contravenes existing provisions of the 25 C.F.R. Part 83 regulations including but not limited to provisions that allow for the consideration of evidence after a petition goes under active consideration, § 83.10(f)(2), and which authorize BAR to conduct independent research. Id., § 83.10(a). The unpromulgated rule of February 11, 2000, also contravenes due process of law and fundamental fairness, as well as the provisions of the APA, 5 U.S.C. § 555 (b), and the DOI Departmental Manual, which indicates that procedures and requirements of this nature should be issued as regulations and not simply published in the Federal Register.

154. The February 11, 2000, unpromulgated rule is a rule as defined in 5 U.S.C. § 551 (4) of the APA and, therefore, is subject to the notice and public comment requirements of the APA.

155. Plaintiffs have and will suffer irreparable injury by defendant Gover's improper issuance of the unpromulgated rule of February 11, 2000, in that it so impairs the plaintiffs' ability to participate meaningfully in the acknowledgment process as to render that process fundamentally unfair.

156. Defendants must be ordered to withdraw the proposed findings and be enjoined from further processing of the EP and PEP petitions until the relief requested in

this Complaint has been granted, new proposed findings published, and adequate and proper formal and informal technical assistance is provided to plaintiffs. If such relief is not granted, plaintiffs will suffer irreparable injury for which there is no adequate remedy at law.

157. The February 11, 2000, unpromulgated rule should be declared invalid. In addition, defendants should be required to cure the harm caused by issuance of that directive in connection with these proposed findings by withdrawing these proposed findings, reopening the record for additional evidence and reissuing the proposed findings as appropriate based on BIA review of the supplemented record.

WHEREAS, Plaintiffs the State and the Towns of North Stonington, Ledyard, and Preston, request the following relief:

a. An order enjoining defendants from taking any further action on the EP and PEP petitions until: (a) the proposed findings have been withdrawn, opportunity for submission of additional evidence has been provided, and proposed findings that comply with the 25 C.F.R. § 83.10 (h) have been issued; (b) adequate and proper formal and informal technical assistance have been provided plaintiffs in accordance with 25 C.F.R. § 83.10(j)(1) and (2); (c) the records requested by plaintiffs pursuant to FOIA have been disclosed; and (d) the period for submission of comments has been extended as necessary in order that the technical assistance and outstanding records sought may be effectively utilized;

b. An order enjoining defendants from enforcing or applying the cut-off date practice and the provisions of the unpromulgated rule complained of, unless and until they have been adopted in accordance with the notice and comment provisions of the APA;

c. A declaration that the defendants' adoption of its cut-off date as well as issuance of that portion of Assistant Secretary Gover's unpromulgated rule of February 11,

2000, complained of violates the notice and comment provisions of the APA, as well as other provisions of law and applicable agency requirements alleged above, as requested in this complaint;

d. A declaration that defendants acted arbitrarily and capriciously by allowing Assistant Secretary Gover to participate in the EP/PEP acknowledgment proceedings;

e. An order enjoining the BIA from withholding the remaining records requested and ordering that they be produced by a date determined by this Court, pursuant to 5 U.S.C. § 552(a)(4)(B);

f. An order to compel the BIA to provide the technical assistance requested by a date determined by the Court, pursuant to 5 U.S.C. § 706(1), which enables the Court to compel agency action unlawfully withheld or unreasonably delayed, and pursuant to other provisions of law;

g. An order requiring the comment period to be extended as necessary in order to allow plaintiffs to utilize effectively the technical assistance and outstanding records sought, when provided;

h. Plaintiffs' fees, cost, disbursements and expenses, including expert witness and attorneys' fees; and

i. Such other relief as this Court deems just, equitable and reasonable.

Respectfully Submitted,

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